IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

DIANA WORTHINGTON,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 1996-100
v.	)	
	)	
EUWEMA INSURANCE AGENCY, INC. and and GUARDIAN INSURANCE COMPANY, INC.,	)	
	)	
Defendants.	)	
	)	

APPEARANCES:

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Attorney for Plaintiff

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Attorney for Defendant Guardian Insurance Co., Inc.

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Attorney for Defendant Euwema Insurance Agency, Inc.

MEMORANDUM OPINION

Finch, C. J.

This matter comes before the Court on Defendant Guardian Insurance Co.'s ("Guardian")

Motion for Summary Judgment on Count 3[1] of Plaintiff Diana Worthington's ("Worthington") Second Amended Complaint. For the reasons expressed below, this Court will grant Guardian's motion.

I. Background

The following facts are alleged by Worthington. Worthington owns rental property on Water Island in the U.S. Virgin Islands, as well as other rental property in the Virgin Islands and elsewhere. It is the property on Water Island that is the subject of the instant lawsuit.

In 1980, Worthington first purchased insurance from Defendant Euwema Insurance Agency, Inc. ("Euwema") on her Water Island property. Plaintiff contends that in the initial negotiations with Roland Euwema, President of Euwema, she advised Mr. Euwema that the structure on the Water Island property was a combination of wood and masonry. In mid-1980, Worthington first noticed that the description of the structure was incorrect. Plaintiff alleges that on several occasions, she contacted Euwema's office in St. Thomas and provided them with a proper description of the construction of the house and was assured by Euwema's office staff that the incorrect description would be corrected.[2] After Hurricane Hugo in 1989, Worthington, through Euwema, obtained insurance on the Water Island property through a new carrier, Defendant Guardian.

In 1991, in Worthington's first application to Guardian, the property was incorrectly

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[1]Defendant's motion, in error, states that Defendant is moving for summary judgment on Count 1 of the Complaint. The motion should read that Defendant is moving for summary judgment on Count 3. At the hearing, Defendant requested and the Court granted an oral amendment to the motion such that it properly reads Count 3 and not Count 1.

[2] Euwema denies ever hearing from Worthington regarding the incorrect description of the property.

described as a "[o]ne [f]amily dwelling of masonry with galvanized roof."[3] Three additional applications for insurance were signed by Worthington, one in 1992, one in 1994 and one in 1995. Each of these applications also incorrectly described the property as being constructed of "masonry with galvanized roof." Each of these applications, although signed by Worthington, was initially prepared by Defendant Euwema. Worthington contends that she tried to correct the description on the 1994 application by adding the words "wood and rubberized coating" to the false description "masonry with galvanized roof." Additionally, Worthington claims that she inserted the words "wood and poly roof" as a modification to the false description given on the 1995 renewal application.

Plaintiff contends that both Defendants, Guardian and Euwema, reviewed the applications as modified by Plaintiff. Based upon the modified applications, Guardian produced insurance policies that expired in March of 1995 and March of 1996.

Worthington's Water Island property was badly damaged in Hurricane Marilyn. Subsequently, Worthington filed a claim with Guardian. On December 1, 1995, Guardian advised Worthington that it was denying her claim. Guardian contends that the insurance policy it entered into with Worthington is void because Worthington did not properly describe the property on her insurance application.

On June 2, 1998, this Court denied Guardian summary judgment against Worthington on the contract claim. This Court denied the motion "because there is a genuine issue of material fact as to whether Worthington intended to deceive Guardian." Memorandum Opinion and

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[3] The description of the property is material to the risk undertaken by the insurer. Property constructed of wood is more susceptible to damage by fire and windstorm than is property constructed of mass masonry. See Affidavit of Warner Bower.

Order, dated June 2, 1998. Guardian now seeks summary judgment on Worthington's bad faith tort claim.

II. Analysis

Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994).

Bad Faith Tort Claim

The elements required to establish a claim for "bad faith," or a breach of the duty of good faith and fair dealing, are set out in this Court's opinion in Justin v. Guardian Ins. Co., 670 F.Supp. 614 (D.V.I. 1987). In Justin, this Court held:

> [I]n the Virgin Islands, in order to make out a cause of action for the tort of bad faith a plaintiff will be required to show: 1) the existence of an insurance contract between the parties and a breach by the insurer; 2) intentional refusal to pay the claim; 3) the non-existence of any reasonably legitimate or arguable reason for the refusal (debatable refusal) either in law or fact; 4) the insurer's knowledge of the absence of such a debatable reason or 5) when the plaintiff argues that the intentional failure results from the failure of the insurer to determine the existence of an arguable basis, the plaintiff must prove the insurer's intentional failure to determine the existence of such a debatable reason. . . . This will require in most normal cases, that a plaintiff obtain a directed verdict on the contract in order to get to the jury and make out a successful bad faith claim.

Justin, 670 F.Supp. at 617.

To withstand a motion for summary judgment in a bad faith claim, this Court has interpreted the above to require that "an insured oppose such a motion with evidence which tends to show that the insurer had no reasonable justification for refusing the claim, and the insurer had actual knowledge of that fact or intentionally failed to determine whether there was any reasonable justification for refusing the claim." In Re: Tutu Wells, 78 F.Supp. 2d 436, 443 (D.V.I. 1999). Thus, the test laid down by Justin requires not only that the plaintiff establish that an insurer lacked even an arguable or debatable reason to deny the claim, but also that the insurer had knowledge or exhibited reckless disregard as to whether it was fairly debatable to deny the claim. See Justin, 670 F.Supp. at 617; see also White v. Continental General Ins. Co., 831 F.Supp. 1545 at 1555 (Wyo. 1993)(The "tort is an intentional one, requiring proof that the defendant's conduct in denying claims was made either knowing that the claim was not fairly debatable, or with reckless disregard as to whether it was fairly debatable. Mere negligence by the defendant is insufficient to make out a prima facie case of this tort.")

Before addressing the issue of whether Guardian intentionally failed to determine whether an arguable basis existed for denying the claim, the Court must first determine whether such a debatable reason existed. If the Court finds that a debatable reason existed, then the inquiry stops there. If, on the other hand, the Court finds that no fairly debatable reason existed then the Court must determine whether Guardian had knowledge of that fact or intentionally failed to determine that fact. In the instant case, the Court finds that Guardian had a debatable reason for denying Worthington's insurance claim.

The "fairly debatable" standard is "premised on the idea that when an insurer denies

coverage with a reasonable basis to believe that no coverage exists, it is not guilty of bad faith even if the insurer is later held to have been wrong. An insurer should have the right to litigate a claim when it feels there is a question of law or fact which needs to be decided before it in good faith is required to pay the claimant." Hudson Universal, Ltd. v. Aetna Ins. Co., 987 F. Supp. 337, at 341(D.N.J. 1997)(citing Anderson v. Continental Ins, Co., 271 N.W.2d 368, 377 (Wis. 1978)).

To impose "bad faith" liability, the insured must demonstrate that no debatable reasons existed for denial of the benefits available under the policy. Hudson, 987 F. Supp. at 342. Furthermore, some courts hold that under the "fairly debatable" standard, "a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad faith refusal to pay the claim." Hudson, 987 F. Supp. at 342; see also Pickett v. Lloyd's, 621 A.2d 445 (1993). In other words, an insurer's disclaimer of coverage cannot be held to be in bad faith unless the insured is granted summary judgment on the issue of coverage.[4] Hudson, 987 F. Supp. at 342.

_____ Similar to the court in Hudson, this Court in Justin stated that in proving that the insurer lacked even a debatable reason, in fact or in law, for denying a claim and that the insurer had actual knowledge of that fact or intentionally failed to determine whether there was a debatable reason for denying a claim, the plaintiff will be required, in most normal cases, to obtain a directed verdict on the contract in order to get to the jury and make out a successful bad faith claim. Justin, 670 F.Supp. at 617. Further, even if the insured is granted summary judgment or obtains a

[4] This Court previously held that there exists a genuine issue of material fact as to whether Worthington intended to deceive Guardian. Thus, Worthington would not be granted summary judgment on the issue of coverage.

directed verdict on the contract claim, the insurer's decision may not constitute bad faith if the coverage issue was "fairly debatable" at the time of the coverage decision. Hudson, 987 F. Supp. at 342; see also National Savings Life Ins. Co. v. Dutton, 419 So.2d 1357, 1362 (Ala. 1982)("Whether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision was made.")

Worthington argues that hers is not a "normal case" and is thus an exception to Justin's "directed verdict rule." She contends that Guardian has failed to show any evidence that her representations regarding the construction of the property were made with an intent to deceive, and therefore Guardian had no legitimate reason to deny the claim.[5] The Court disagrees. The facts of the instant case demonstrate that it was objectively reasonable[6] for Guardian to conclude that Worthington had intended to deceive it when she filled out her insurance application. Specifically, Worthington signed numerous applications for property insurance which falsely represented that the dwelling in question was of masonry construction. Worthington did not strike out the false description, either in whole or in part. On the first application in 1992, she simply signed the false application describing the property as being a "[o]ne [f]amily dwelling of masonry with galvanize roof." See Deposition of Worthington, Exhibit 5. In 1994, Worthington, again seeing the false description, did not delete it but instead wrote in parenthesis after the typed

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[5] Actually, courts have held that it is the plaintiff's burden to show that the defendant insurer has no legal or factual defense to the insurance claim. See National Security Fire & Casualty Co. v. Vintson, 454 So.2d 942, 945 (Ala. 1984); see also State Farm & Casualty Co. v. Balmer, 672 F.Supp. 1395, 1401 (Ala. 1987), aff'd 891 F.2d 874 (11th Cir. 1990).

[6] The tort of bad faith is "an intentional one and will only succeed if the facts demonstrate, on the basis of an objective standard, that a reasonable insurer under the circumstances would not have denied or delayed payment of the claim." See Farmer's Union Central Exchange, Inc. v. Reliance Ins. Co., 675 F.Supp. 1534, 1538-1539 (D.N.D. 1987)

description "masonry with galvanize roof," the words "(wood and rubberized covering)." In 1995, Worthington again signed an application with the same false description on it. Further, although Worthington claims that she called Euwema many times to try to clarify the description of the property, it does not appear that evidence of these calls was before Guardian at the time it denied her claim.

While the above facts may not prove that Worthington intended to deceive Guardian, they do provide Guardian with a debatable reason to deny Worthington's insurance claim. Therefore, based upon Worthington's submission of numerous false applications and her apparent failure to unambiguously correct the description of the property before submitting the applications to Guardian, the Court finds that it was reasonable for Guardian to conclude that Worthington had intentionally deceived it.

III. Conclusion

Because the Court finds that Guardian had a debatable reason to deny Worthington's insurance claim, it will dismiss Worthington's bad faith tort claim against Guardian. An appropriate Order is attached.

ENTER:

DATED: May ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

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Defendants.	)	
	)	

ORDER

Presently before the Court is Defendant Guardian's Motion for Summary Judgment on Count 3 of Plaintiff's Second Amended Complaint. For the reasons stated in the attached Memorandum Opinion, it is hereby

ORDERED that Defendant Guardian's motion is **GRANTED**.

ENTER:

DATED: May ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

cc: Charles B. Herndon, Esq.
Maria Tankenson Hodge, Esq.
R. Eric Moore, Esq.